

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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Yoandy Fernandez Morales,

Plaintiff,

v.

Aguilar, et al.,

Defendants.

Case No. 2:22-cv-00451-RFB-DJA

Order

Plaintiff is an inmate in the custody of the Nevada Department of Corrections (“NDOC”) proceeding *pro se*. Before the Court are the following eight motions: Plaintiff’s motion for a protective order (ECF No. 43); Plaintiff’s motion to substitute a party (ECF No. 48); Plaintiff’s motion for a translator and for possession of medical records (ECF No. 49); Plaintiff’s motion to join a real party in interest (ECF No. 50); Plaintiff’s motion for an order to produce documents for *in-camera* review (ECF No. 53); Plaintiff’s motion for appointment of counsel (ECF No. 55); Plaintiff’s motion for an order adding a real party in interest (ECF No. 57); and Plaintiff’s motion to strike (ECF No. 60). As discussed more fully below, the Court denies each of Plaintiff’s motions.

I. Discussion.

A. *Plaintiff’s motion for a protective order (ECF No. 43).*

Plaintiff moves for a “preliminary injunction and/or protective order.” (ECF No. 43). However, his motion addresses only his request for a preliminary injunction, which is properly separately filed. (ECF No. 42). Because Plaintiff does not include any points and authorities regarding his request for a protective order or explain what relief he seeks through a protective order, the Court denies his motion for protective order (ECF No. 43) without prejudice.

1 **B. Plaintiff's motion to substitute party (ECF No. 48).**

2 Plaintiff moves for the Court to substitute Defendant Gregory Martin with Martin's estate
 3 after the Attorney General's Office filed a suggestion of death for Martin. (ECF Nos. 46, 48). "If
 4 a party dies and the claim is not extinguished, the court may order substitution of the proper
 5 party." Fed. R. Civ. P. 25(a)(1). The motion for substitution must be filed "within 90 days after
 6 service of a statement noting the death." *Id.* To trigger this 90-day period, "[f]irst, a party must
 7 formally suggest the death of the party upon the record ... Second, the suggesting party must serve
 8 other parties and nonparty successors or representatives of the deceased with a suggestion of
 9 death in the same manner as required for service of the motion to substitute." *Barlow v. Ground*,
 10 39 F.3d 231, 233 (9th Cir. 1994) (citations omitted). The Ninth Circuit has held that the party
 11 responsible for identifying the decedent's successor is the party who is in the best position to do
 12 so. *See Gilmore v. Lockard*, 936 F.3d 857, 866-67 (9th Cir. 2019). In the context of inmate
 13 litigation, this burden often lies with the state attorney general, who is "significantly better
 14 positioned" than an incarcerated *pro se* plaintiff with limited resources, to ascertain the proper
 15 successor or representative. *See id.* at 866. Shifting the onus to a *pro se* litigant may place him
 16 "at a tactical disadvantage" and "would defeat the purpose of Rule 25(a): to preserve parties'
 17 rights and causes of action when a party dies." *Id.* Hence, to trigger the 90-day deadline for
 18 filing a motion for substitution, the state attorney general must either serve the decedent's
 19 successor, or *at the very least*, identify the proper successor or representatives. *See id.* at 867.

20 In his motion, Plaintiff asks the Court to substitute Martin with Martin's estate. Like in
 21 *Gilmore*, where a defendant also died in the middle of litigation and the state attorney general
 22 notified the plaintiff, the AG here is in a significantly better position to identify Martin's
 23 successor than Plaintiff. This is particularly true, given that the AG represented Martin and has
 24 an existing relationship with the NDOC. *See Gilmore*, 936 F.3d at 866. Defendants' filing of a
 25 suggestion of death for Martin, without more, is insufficient under Rule 25. (ECF No. 46).
 26 *Gilmore* requires that the AG, *at a minimum*, identify Martin's successor or representatives to
 27 trigger the 90-day window. *See* 936 F.3d at 867. The Court therefore directs the AG to comply
 28 with their obligations under *Gilmore*. The AG shall have until July 12, 2023 to file either a notice

1 and proof of service on the successor or a declaration outlining the efforts made to locate a
2 successor.

3 The Court denies Plaintiff's motion to substitute Martin with his estate (ECF No. 48) as
4 premature. Because the AG has not served Martin's successors or representatives, the ninety-day
5 window in which Plaintiff must move to substitute parties has not yet started. Additionally, at
6 this time, there is no representative for the Court to substitute into Martin's place. Plaintiff may
7 move to substitute parties ninety days after the AG has served Martin's successors or
8 representatives if the AG has been successful in doing so.

9 **C. *Plaintiff's motion for translator and possession of medical records (ECF No.***
10 ***49).***

11 Plaintiff moves the Court to require the prison to provide him a translator at each of his
12 medical appointments and to allow him to possess his medical records. (ECF No. 49).
13 Defendants respond that Plaintiff is seeking injunctive relief without providing points and
14 authorities and that Plaintiff has filed items on the docket belying his requests. (ECF No. 51).
15 Defendants point out that Plaintiff has filed numerous pages of his medical records on the docket,
16 demonstrating that he has at least some access to his records. And although Plaintiff's complaint
17 contained a disclosure stating that he had the help of another inmate drafting his complaint, none
18 of his subsequent filings—in English—have included that disclosure. Defendants point out that,
19 in another case, Plaintiff filed a forty-five page, handwritten, English-language response to
20 Defendants' motion for summary judgment within around twenty-four hours of Defendants filing
21 their motion. *See Morales v. Dr. Agustin*, Case No. 2:21-cv-01319-GMN-NJK at ECF No. 45.
22 But Plaintiff did not declare that he had any help drafting the response, and given the quick
23 turnaround, it is unlikely that he did. Defendants assert that Plaintiff's filings cast serious doubt
24 on his claim that he cannot understand English. Plaintiff did not file a reply in support of his
25 motion.

26 The Court denies Plaintiff's motion without prejudice. The Court notes that Plaintiff is
27 effectively seeking injunctive relief but, as Defendants point out, did not include points and
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1 authorities required by Nevada Local Rule 7-2(a).¹ Additionally, Plaintiff does not explain how
 2 or why he has been unable to access his medical records or why, given the fact that his motion
 3 and the attached grievance he submitted to the prison regarding the issue are in clear and
 4 understandable English, that he needs a translator for his medical appointments. *See Winter v.*
 5 *Natural Resources Defense Council*, 555 U.S. 7, 22 (2008) (explaining that a preliminary
 6 injunction is “an extraordinary remedy that may only be awarded upon a clear showing that the
 7 plaintiff is entitled to such relief.”). The Court also takes judicial notice of the response that
 8 Plaintiff filed to the defendants’ motion for summary judgment in *Morales v. Dr. Agustin et al.*,
 9 Case No. 2:21-cv-01319-GMN-NJK at ECF No. 45 and the timing of that filing, which, without
 10 explanation, tends to demonstrate that Plaintiff wrote it. The Court will thus deny Plaintiff’s
 11 motion (ECF No. 49) without prejudice. To the extent Plaintiff wishes to re-file his motion, he
 12 must explain these discrepancies and demonstrate why he is entitled to injunctive relief under the
 13 appropriate standard.

14 ***D. Plaintiff’s motions to join real party in interest and motion to strike (ECF Nos.***
 15 ***50, 57, 60).***

16 Plaintiff moves to assign a person named Theodore Stevens 25% of any recovery Plaintiff
 17 receives in this case. (ECF No. 50). Plaintiff also requests to have Stevens added as a Plaintiff as
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19 ¹ The Court notes that Plaintiff did cite to a case to support the proposition that an uncorrected
 20 language barrier in the context of patient-doctor communications can result in an unconstitutional
 21 deficiency in medical care. *See Anderson v. County of Kern*, 45 F.3d 1310, 1316-17 (9th Cir.
 22 1995). Nonetheless, Plaintiff does not explain why he is entitled to injunctive relief under the
 23 appropriate standard. To demonstrate an entitlement to injunctive relief, a moving party must
 24 prove that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the
 25 absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction
 26 is in the public interest. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (citing
 27 *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008)). The Ninth Circuit also recognizes an
 28 additional standard: “if a plaintiff can only show that there are ‘serious questions going to the
 merits’—a lesser showing than likelihood of success on the merits—then a preliminary injunction
 may still issue if the ‘balance of hardships tips *sharply* in the plaintiff’s favor, and the other two
Winter factors are satisfied.” *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th
 Cir. 2013) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir.
 2011)).

1 a real party in interest. After Defendants did not respond to his motion, Plaintiff filed another
2 motion to add Stevens, pointing out that Defendants' non-response constituted their consent to the
3 Court granting the motion. (ECF No. 57). Defendants responded to Plaintiff's second motion,
4 arguing that even an assignment of proceeds of a litigation does not mean that the assignee has
5 standing as a real party in interest. (ECF No. 58). Defendants add that Nevada courts generally
6 prohibit the assignment of tort claims on public policy grounds, that Plaintiff has not
7 demonstrated that Stevens otherwise has standing, that Plaintiff has not demonstrated a valid
8 agreement assigning the proceeds of this litigation to Stevens, and that inmate civil rights
9 litigations are personal in nature.²

10 Plaintiff moves to strike Defendants' response, arguing that they did not respond within
11 the required time to the first motion. (ECF No. 60). Plaintiff adds that his motion seeks to assign
12 the proceeds of his litigation, not the claim. Defendants respond that Plaintiff's motion failed to
13 identify any points and authorities on which it is based. (ECF No. 61).

14 Under Federal Rule of Civil Procedure 17(a)(1) an action must be prosecuted in the name
15 of the real party in interest. Under Nevada law, "a meaningful legal distinction exists between
16 assigning the rights to a tort action and assigning the proceeds from such an action." *Achrem v.*
17 *Expressway Plaza Ltd. P'ship*, 112 Nev. 737, 741, 917 P.2d 447, 449 (Nev. 1996). The latter is
18 permissible while the former is not. *Id.* As the Nevada Supreme Court explained, "[w]hen the
19 *proceeds* of a settlement are assigned, the injured party retains control of their lawsuit and the
20 assignee cannot pursue the action independently." *Id.*

21 As a preliminary matter, the Court denies Plaintiff's motion to strike Defendants' response
22 as untimely because Defendants were not responding to Plaintiff's initial motion, but his second
23 motion. And their response to his second motion was timely. The Court also denies Plaintiff's
24 motions to add Stevens as a party. Plaintiff does not explain how or why Stevens is a real party in
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26 ² Defendants point out that "it appears the bargained for exchange in this case is Theodore
27 Stevens providing legal assistance to Morales. *See* ECF No. 52 at 2. If true, that would place
28 Theodore Stevens in criminal legal jeopardy for the unlicensed practice of law." (ECF No. 58 at 3).

1 interest to this case. Nor does Plaintiff cite any authority for his request for the Court to assign
2 the proceeds of any settlement or judgment in this matter to Stevens. As a result, even though
3 Defendants did not respond to his original motion, Plaintiff has not provided grounds on which
4 the Court can grant his requested relief. The Court denies Plaintiff's motions (ECF Nos 50, 57,
5 60).

6 ***E. Plaintiff's motion to produce documents for in-camera review (ECF No. 53).***

7 Plaintiff's motion for *in-camera* review is really a motion to compel Defendants to
8 produce documents in response to Plaintiff's requests for production. (ECF No. 53). Defendants
9 respond that Plaintiff failed to certify that he met and conferred with Defendants and failed to set
10 forth the text of the discovery requests he issued to Defendants and how their responses were
11 deficient. (ECF No. 54). Plaintiff replies that he is seeking documents that he asserts Defendants
12 removed from his medical records. (ECF No. 56). He asserts that, because of his language barrier,
13 he is reliant on jailhouse lawyers and has been unable to articulate or accurately explain what
14 documents are missing from his medical file. He adds that Defendants' counsel sent him a letter
15 "telling Plaintiff not to write him any more letters" such that Plaintiff did not think he could meet
16 and confer with Defendants' counsel.

17 The Court denies Plaintiff's motion to compel. It is unclear from Plaintiff's motion and
18 reply whether he requested the documents he seeks from Defendants. Although Plaintiff asserts
19 that certain documents are missing from his medical records—which he requested from
20 Defendants—he must first attempt to meet and confer with Defendants to resolve the issue before
21 coming to the Court. *See* Fed. R. Civ. P. 37(a)(1) ("the motion [to compel] must include a
22 certification that the movant has in good faith conferred or attempted to confer with the person or
23 party failing to make disclosure or discovery in an effort to obtain it without court intervention.").
24 The Court notes that the letter Defendant's counsel sent Plaintiff did not tell Plaintiff not to send
25 letters regarding meet-and-confers, but instead informed Plaintiff that his letters regarding his
26 ability to view his medical records are not appropriately directed to Defendants' counsel but are
27 more appropriately governed by NDOC Administrative Regulation 639.03. Additionally, while
28 Plaintiff states that he is unable to articulate or explain what documents are missing from his

1 medical file because of his language barrier, the Court notes that Plaintiff's motion outlines each
2 document he seeks in detail, requesting items like "Non-Formulary Drug Request for the date of
3 January 5, 2023," and "Southern Desert Correctional Center Medical Consult Request for the date
4 of December 12, 2021." (ECF No. 53 at 3). The Court thus denies Plaintiff's motion to compel
5 (ECF No. 53) and will require Plaintiff to meet and confer with Defendants regarding his missing
6 medical records.

7 ***F. Plaintiff's motion for appointment of counsel (ECF No. 55).***

8 Plaintiff moves for appointment of counsel, arguing that he speaks no English and is
9 entirely reliant on jailhouse lawyers and other inmates to write his filings, translate court
10 documents, and to help him find his missing medical records. (ECF No. 55). Plaintiff adds that
11 he is not allowed under prison regulations to possess his medical records and thus needs counsel
12 to review and translate the records. A "person [generally] has no right to counsel in civil
13 actions." *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009) (citing *Storseth v. Spellman*, 654
14 F.2d 1349, 1353 (9th Cir. 1981)). 28 U.S.C. § 1915(e)(1), however, does allow the court to
15 "request an attorney to represent any person unable to afford counsel." That being said, the
16 appointment of counsel in a civil case is within the court's discretion and is only allowed in
17 "exceptional cases." *See Palmer*, 560 F.3d at 970 (citations omitted); *see also Harrington v.*
18 *Scribner*, 785 F.3d 1299, 1309 (9th Cir. 2015). In "determining whether 'exceptional
19 circumstances' exist, a court must consider 'the likelihood of success on the merits as well as the
20 ability of the petitioner to articulate his claims *pro se* in light of the complexity of the legal issues
21 involved.'" *Palmer*, 560 F.3d at 970 (quoting *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir.
22 1983)); *see also Cano v. Taylor*, 739 F.3d 1213, 1218 (9th Cir. 2015). "Neither of these
23 considerations is dispositive and instead must be viewed together." *Id.* (citing *Wilborn v.*
24 *Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)); *see also Terrell v. Brewer*, 935 F.2d 1015,
25 1017 (9th Cir. 1991) (citation omitted).

26 Here, the Court does not find exceptional circumstances to grant appointment of counsel.
27 Plaintiff's motion does not address the likelihood of success on the merits. And while Plaintiff
28 asserts that he speaks no English and is unable to translate his medical records, as outlined more

1 fully above, certain of Plaintiff's filings have cast doubt on whether he speaks no English.
2 Additionally, Plaintiff asserts that he is a licensed physician in his native country and is thus
3 familiar with medical documents. Without more clarity about whether and how Plaintiff has been
4 engaging in litigation without a translator, the Court does not find that Plaintiff has demonstrated
5 an inability to articulate his claims *pro se*. This is particularly true because, even if Plaintiff is
6 using an interpreter, Plaintiff has demonstrated an ability to successfully litigate his case with the
7 help of others interpreting for him. The Court denies Plaintiff's motion (ECF No. 55) without
8 prejudice.

9 **IT IS THEREFORE ORDERED** that Plaintiff's motion for a protective order (ECF No.
10 43) is **denied without prejudice**.

11 **IT IS FURTHER ORDERED** that Plaintiff's motion to substitute Defendant Martin's
12 estate in place of Martin (ECF No. 48) is **denied without prejudice as premature**.

13 **IT IS FURTHER ORDERED** that the AG shall have until **July 12, 2023** to file either a
14 notice and proof of service on Martin's successor or a declaration outlining the efforts made to
15 locate a successor.

16 **IT IS FURTHER ORDERED** that Plaintiff's motion for a translator and for possession
17 of his medical records (ECF No. 49) is **denied without prejudice**.

18 **IT IS FURTHER ORDERED** that Plaintiff's motions to join Stevens as a party (ECF
19 Nos. 50, 57) are **denied without prejudice**.

20 **IT IS FURTHER ORDERED** that Plaintiff's motion for an order to produce documents
21 for *in-camera review* (ECF No. 53) is **denied without prejudice**.

22 **IT IS FURTHER ORDERED** that Plaintiff's motion for appointment of counsel (ECF
23 No. 55) is **denied without prejudice**.

24 **IT IS FURTHER ORDERED** that Plaintiff's motion to strike Defendants' response to
25 his motion to join Stevens (ECF No. 60) is **denied**.

26 DATED: June 13, 2023

27 
28 DANIEL J. ALBREGTS
UNITED STATES MAGISTRATE JUDGE